ORAL ARGUMENT EN BANC SCHEDULED MAY 24, 2017

No. 15-1177
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION; PHH MORTGAGE CORP.; PHH HOME LOANS, LLC; ATRIUM INSURANCE CORP.; and ATRIUM REINSURANCE CORP.,
Petitioners,
v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION
(CFPB FILE NO. 2014-CFPB-0002)

BRIEF ON REHEARING EN BANC OF RESPONDENT
CONSUMER FINANCIAL PROTECTION BUREAU

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Lawrence DeMille-Wagman
Senior Litigation Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7957
lawrence.wagman@cfpb.gov
Counsel for Respondent
Consumer Financial Protection Bureau

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors who appeared in the administrative proceeding before the Consumer Financial Protection Bureau are listed in Certificate supplied by the Petitioners. All parties who have appeared before this Court are listed in Petitioners' brief. Except for the following, all amici who have appeared before this Court are listed in Petitioners' brief: Cato Institute, RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Partners, LP, Roni Dersovitz, and the States of Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Nevada, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

B. Ruling Under Review

The Decision and Order under review are listed in the Certificate supplied by Petitioners. There is no official citation for the Decision and Order.

C. Related Cases

This matter has not been previously before this Court or any other court. There are no related cases before this Court or any other court.

TABLE OF CONTENTS

PAGE

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

A. Parties and Amici i

B. Ruling Under Review i

C. Related Cases i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

GLOSSARY xiii

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 3

STATUTES AND REGULATIONS 4

STATEMENT OF FACTS 4

A. The Consumer Financial Protection Bureau 4

B. RESPA 5

C. PHH, Mortgage Insurance, and Reinsurance 7

D. Proceedings before the Bureau 8

E. The panel's decision 10

STANDARD OF REVIEW 13

SUMMARY OF ARGUMENT 13

ARGUMENT 17

I. THE BUREAU'S STRUCTURE IS CONSTITUTIONAL.................... 17

A. For-cause removal is constitutional 17

1. The CFPA's for-cause removal provision does not prevent the President from accomplishing his constitutional duties... 18

2. The Bureau's single-director structure does not prevent the President from accomplishing his constitutional duties 23

B. If this Court holds the Bureau's structure unconstitutional, the proper remedy is to sever the for-cause-removal provision from the CFPA 32

II. THIS COURT SHOULD ADDRESS THE CONSTITUTIONALITY OF THE BUREAU'S STRUCTURE 33

A. The Director correctly interpreted RESPA.. 35

1. PHH's kickback scheme violated RESPA 35

2. RESPA's statute of limitations does not apply 39

3. PHH violated RESPA every time it accepted a payment for reinsurance.. 42

B. Sanctioning PHH for its RESPA violations does not offend fair notice 45

III. IF THIS COURT HOLDS IN *LUCIA* THAT THE SEC's ALJ WAS AN INFERIOR OFFICER, IT SHOULD EITHER SEEK SUPPLEMENTAL BRIEFING IN THIS MATTER OR VACATE AND REMAND TO THE BUREAU............................ 52

CONCLUSION 53

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **PAGE**

Am. Fed. of Gov't Emps., AFL-CIO v. FLRA,
388 F.3d 405 (3d Cir. 2004).. 28

Ass'n of Am. RRs v. DOT,
721 F.3d 666 (D.C. Cir. 2013),*vacated* 135 S. Ct. 1225 (2015)........................ 28

Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,
515 U.S. 687 (1995).. 35

Beringer v. Sheahan,
934 F.2d 110 (7th Cir. 1991) 34

Bowsher v. Synar,
478 U.S. 714 (1986).. 27

* *BP America Prod. Co. v. Burton*,
549 U.S. 84 (2006).. 40, 41

* *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*,
467 U.S. 837 (1984).. 13, 35

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012).. 50

Clark-Cowlitz Joint Operating Agency v. FERC,
826 F.2d 1074 (D.C. Cir. 1987).. 50

CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-00292-SEB-TAB
2015 WL 1013508 (S.D. Ind. Mar. 6, 2015) 34

CFPB v. Morgan Drexen, Inc.,
60 F. Supp. 3d 1082 (C.D. Cal. 2014) 34

Authorities upon which we chiefly rely are marked with asterisks.

Cunningham v. M&T Bank Corp.,
814 F.3d 156 (3d Cir. 2016).. 43

E.I. Du Pont Nemours & Co. v. Davis,
264 U.S. 456 (1924).. 41

Fabi Constr. Co. v. Sec. of Labor,
508 F.3d 1077 (D.C. Cir. 2007).. 51

FTC v. Bronson Partners, LLC,
654 F.3d 359 (2d Cir. 2011).. 45

FTC v. Nat'l Lead Co.,
352 U.S. 419 (1957).. 45

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.
561 U.S. 477 (2010).. 2, 18, 22, 28, 30, 32

Gen. Elec. Co. v. EPA,
53 F.3d 1324 (D.C. Cir. 1995).. 51

Guaranty Trust Co. of N.Y. v. United States,
304 U.S. 126 (1938).. 42

* *Humphrey's Executor v. United States*,
295 U.S. 602 (1935).................................... 2, 13, 18, 19, 20, 23, 24, 30, 31, 32

In re Aiken Cnty.
725 F.3d 255 (D.C. Cir. 2013).. 28

In re: Cisneros,
454 F.3d 342 (D.C. Cir. 2006).. 25

King v. Burwell,
135 S. Ct. 2480 (2015).. 37

Lucia v. SEC,
832 F.3d 277 (D.C. Cir. 2016).. 1, 52

Lyng v. Northwest Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 33

* *McDonald v. Thompson*,
305 U.S. 263 (1938) 38

Mistretta v. United States,
488 U.S. 361 (1989) 13, 24

* *Morrison v. Olson*,
487 U.S. 654 (1988) 2, 18, 19, 20, 24, 31, 32

Mullinax v. Radian Guar. Inc.,
199 F. Supp. 2d 311 (M.D.N.C. 2002) 44

Munoz v. PHH Corp.,
No. 1:08-cv-759 (E.D. Cal.) 46

Myers v. United States,
272 U.S. 52 (1926) 32

Nat'l Automatic Laundry and Cleaning Council v. Schultz,
443 F.2d 689 (D.C. Cir. 1971) 47

New Eng. Power Generators Ass'n, Inc. v. FERC,
707 F.3d 364 (D.C. Cir. 2013) 39

Nixon v. Administrator of Gen. Servs.,
433 U.S. 425 (1977) 18

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 50, 51

NLRB v. Noel Canning,
134 S. Ct. 2550 (2014) 25, 26

Proffitt v. FDIC,
200 F.3d 855 (D.C. Cir.2000) 41

Snow v. First American Title Ins. Co.,
332 F.3d 356 (5th Cir. 2003) 44

State Nat'l Bank of Big Spring v. Lew,
197 F. Supp. 3d 177 (D.D.C. 2016) 34

Trinity Broad. of Fla., Inc. v. FCC,
211 F.3d 618 (D.C. Cir. 2000) 51

Verizon Tel. Cos. v. FCC,
269 F.3d 1098 (D.C. Cir. 2001) 50, 51

White v. PNC Fin. Services Group, Inc.,
CV 11-7928, 2017 WL 85378 (E.D. Pa. Jan. 10, 2017) 44

Zacharias v. SEC,
569 F.3d 458 (D.C. Cir. 2009) 51

STATUTES

12 U.S.C. 241 30

12 U.S.C. 242 30

12 U.S.C. 243 28

12 U.S.C. 1818(b) 41

Real Estate Settlement Procedures Act

* 12 U.S.C. 2601(b)(2) 6

12 U.S.C. 2606 36

12 U.S.C. 2607(a) (section 8(a))..... 6, 9, 10, 35, 36, 37, 38, 42, 43, 44, 48, 49

12 U.S.C. 2607(c)(2) (section 8(c)(2)) 9, 10, 11, 15, 35, 36, 37, 51

12 U.S.C. 2614 .... 12, 39

* 12 U.S.C. 2617(b) (section 19(b)) 49, 50

Dodd-Frank

12 U.S.C. 5302 32

12 U.S.C. 5481(12)(M) 5

12 U.S.C. 5481(14) 4, 5, 20

12 U.S.C. 5491(a) 4, 5

12 U.S.C. 5491(b)(2) 5

12 U.S.C. 5491(c)(1) 5

12 U.S.C. 5491(c)(3) 5, 11, 17, 18, 32, 33

12 U.S.C. 5492(c)(4) 22

12 U.S.C. 5497(a) 28

12 U.S.C. 5497(d)(1) 41

12 U.S.C. 5511 .... 5, 20

12 U.S.C. 5511(a) 5

12 U.S.C. 5511(b)(4) 33

12 U.S.C. 5511(c) 5, 21

12 U.S.C. 5512(b)(4) 22

12 U.S.C. 5514 5

12 U.S.C. 5515 5

12 U.S.C. 5516 5

12 U.S.C. 5531(a) 21

12 U.S.C. 5536(a) 21

12 U.S.C. 5562(b) 21

12 U.S.C. 5562(c) 21

12 U.S.C. 5562(e) 21

12 U.S.C. 5563 .... 5, 21, 40

12 U.S.C. 5563(b) 41

12 U.S.C. 5563(b)(4) 21

12 U.S.C. 5564 .... 5, 21

12 U.S.C. 5564(g) 40

12 U.S.C. 5565(a)(2)(D) 45

12 U.S.C. 5565(c) 41

Federal Trade Commission Act

15 U.S.C. 41 18

15 U.S.C. 45 .... 19, 20

15 U.S.C. 46(a) 19

15 U.S.C. 46(f) 20

15 U.S.C. 49 19

28 U.S.C. 591(c) (Supp. V 1987) 25

28 U.S.C. 594(a) 25

28 U.S.C. 2462 41

REGULATIONS

Regulation X

12 C.F.R. Part 1024 6

12 C.F.R. 1024.2(b) (2013) 6

* 12 C.F.R. 1024.4 (2011) 6, 49

* 12 C.F.R. 1024.4(a)(2) (2012) 46

* 12 C.F.R. 1024.4(b) (2012) 46

* 12 C.F.R. 1024.5(b)(7) 38

12 C.F.R. 1024.14(d) 6, 35

12 C.F.R. 1024.14(e) 6

12 C.F.R. 1024.14(g)(2) 37, 39

24 C.F.R. Part 3500 6

* 24 C.F.R. 3500.4 .... 6, 49

* 24 C.F.R. 3500.4(a)(2) (1997) 46, 47

* 24 C.F.R. 3500.4(b) 46, 47

MISCELLANEOUS

61 Fed. Reg. 29264 (June 7, 1996) 49

66 Fed. Reg. 53052 (Oct. 18, 2001) 49

* S. Rep. No. 111-176 (2010) 4, 33

The Federalist No. 70 (J. Cooke ed. 1961) 30

GLOSSARY

ALJ	Administrative Law Judge
Atrium	Petitioners Atrium Insurance Corp. and Atrium Reinsurance Corp.
Br.	Opening Brief En Banc for Petitioners
CFPB	Consumer Financial Protection Bureau
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act
FTC	Federal Trade Commission
JA	Joint Appendix
HUD	United States Department of Housing and Urban Development
PHH	Petitioners PHH Corp., PHH Mortgage Corp., PHH Home Loans, LLC, Atrium Insurance Corp., and Atrium Reinsurance Corp.
RESPA	Real Estate Settlement Procedures Act of 1974
U.S. Br.	Brief for the United States as Amicus Curiae

INTRODUCTION

This case began as a challenge to a kickback scheme orchestrated by a mortgage lender, Respondent PHH, but it morphed into a constitutional attack on the government's primary enforcer of consumer financial laws. After an administrative adjudication, the Consumer Financial Protection Bureau (Bureau) concluded that PHH's kickback scheme violated the Real Estate Settlement Procedures Act (RESPA), and ordered it to disgorge a fraction of the kickbacks it had received. A panel of this Court vacated the Bureau's Order not only on statutory grounds, but also because it believed the Bureau was unconstitutionally structured, a holding in direct tension with several Supreme Court decisions.

This Court granted the Bureau's petition for rehearing en banc (which was supported by the United States) and vacated the panel's judgment. It ordered additional briefing and directed the parties to address: 1) whether the Bureau's structure as a single-Director independent agency violates Article II of the Constitution, and, if it does, the appropriate remedy; 2) whether this Court could avoid addressing the Bureau's constitutionality if it accepts one of the panel's other grounds for vacating the Bureau's Order; and 3) what is the appropriate disposition of this case if this Court holds in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), that the ALJ used by the SEC was an inferior officer.

First, Congress did not violate Article II by creating an independent agency led by a single Director removable only for cause. This issue turns on a single question: "whether the removal restrictions [at issue here] are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). This question was answered in the negative more than eighty years ago in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Since then, the Supreme Court has repeatedly recognized that Congress can, consistent with the Constitution, "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). Congress chose a single-Director structure for the Bureau rather than a multi-member body, but this is not a basis to distinguish this precedent. As the panel recognized, whether an independent agency is led "by one, three, or five members" will result in "no meaningful difference in responsiveness and accountability to the President." Panel Opinion (Op.) at 56. Thus, the for-cause removal provision that applies to the Bureau's Director does not "impede the President's ability to perform his constitutional duty," and does not violate Article II.

Second, this Court cannot avoid addressing the constitutional issue unless it agrees with the panel and vacates the Bureau's Order on other grounds. But because the panel erred in its rulings on the merits, the Court has no choice but to decide the separation-of-powers issue. Further, even if the Court were to vacate the Bureau's Order on the merits, it should nonetheless exercise its discretion to address the Bureau's constitutionality. The Bureau and PHH litigated the issue before the panel, the parties have again briefed the issue, and the issue is pending in other cases in this circuit and elsewhere.

Third, if this Court concludes in its reconsideration of *SEC v. Lucia* that the SEC's ALJ was an inferior officer, then depending on the grounds for that holding, it should call for supplemental briefing to determine whether that holding would apply to the ALJ that presided here. However, if the Court determines that supplemental briefing is unnecessary because the Bureau's ALJ cannot be distinguished, the Court should uphold the Bureau's constitutionality, vacate the Director's Order without addressing PHH's liability under RESPA, and remand so that the Bureau can determine whether to conduct new proceedings before a properly appointed ALJ.

ISSUES PRESENTED FOR REVIEW

1) Is the Bureau's structure unconstitutional because its Director may be removed only for cause, and, if so, is the appropriate remedy to sever the for-cause removal provision from the Consumer Financial Protection Act?

2) May this Court avoid addressing the constitutionality of the Bureau's structure if it adopts the panel's holdings as to PHH's liability under RESPA, and should it adopt those holdings?

3) What is the appropriate disposition of this case if this Court concludes that the SEC's administrative law judges are inferior officers?

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in the addendum to this brief and in the addendum submitted by PHH.

STATEMENT OF FACTS

A. The Consumer Financial Protection Bureau

As part of its response to the 2008 financial crisis, Congress enacted the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. 5481 *et seq.* The CFPA established the Bureau and charged it with enforcing certain pre-existing consumer financial laws, as well as the newly-enacted CFPA. 12 U.S.C. 5491(a). Prior to the Bureau's creation, the pre-existing laws were enforced by seven separate agencies, some of which were primarily focused on the safety and soundness of the entities they regulated, not on consumer protection. S. Rep. No. 111-176 at 10 (2010). Congress concluded that regulation and enforcement by these agencies was "too fragmented to be effective." *Id.* Thus, the Bureau was to be "a new, streamlined independent consumer entity," an agency that would provide "a more effective approach," and could ameliorate the "failure of the safety and soundness regulators." *Id.* at 11, 15.

The Bureau's primary functions include supervising "covered persons" for compliance with Federal consumer financial laws. 12 U.S.C. 5511, 5514-16. It can take appropriate enforcement action when it identifies violations – either by initiating an administrative proceeding reviewable in the courts of appeals (as in this case) or by bringing an enforcement action directly in district court. 12 U.S.C. 5563, 5564. Further, the Bureau collects, researches, monitors, and publishes information relevant to the functioning of markets for consumer financial products and services; conducts financial education programs; responds to consumer complaints; and issues rules, orders, and guidance to implement the laws it enforces. *See* 12 U.S.C. 5511(c).

Congress decided that the Bureau should be an executive agency, headed by a Director who is appointed by the President (with the advice and consent of the Senate) for a five-year term. 12 U.S.C. 5491(a), (b)(2), (c)(1). The Director is removable by the President "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

B. RESPA

RESPA is one of the laws the Bureau enforces. 12 U.S.C. 5481(12)(M), 5481(14), 5511(a). Congress enacted RESPA in 1974 to "eliminat[e] … kickbacks or referral fees that tend to increase unnecessarily the costs of certain [real estate] settlement services[.]" 12 U.S.C. 2601(b)(2). Section 8(a) of RESPA does exactly that:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. 2607(a). Regulation X, which implements RESPA, explains that "settlement service" encompasses all the services connected to the settlement of a mortgage, including the "[p]rovision of services involving mortgage insurance"; that an "agreement or understanding" "need not be written or verbalized but may be established by a practice, pattern or course of conduct"; and that a "thing of value" includes "the opportunity to participate in a money-making program." 12 C.F.R. 1024.2(b), 1024.14(d), (e).[1]

---

[1] When the Department of Housing and Urban Development (HUD) administered RESPA, the implementing regulations were codified at 24 C.F.R. Part 3500. When Congress transferred authority to the Bureau, the Bureau republished HUD's rules as its new Regulation X, 12 C.F.R. Part 1024, without substantive change. The numbering of the sections was not changed, so, for example, 24 C.F.R. 3500.4 was renumbered 12 C.F.R. 1024.4. (Some of the sections were reorganized and renumbered in 2013.) All of the provisions quoted in this brief were originally promulgated by HUD.

C. PHH, Mortgage Insurance, and Reinsurance

PHH, a mortgage lender, required borrowers who financed more than 80% of the value of a home to purchase mortgage insurance. Joint Appendix (JA) at 3. Mortgage insurance provides protection for mortgage lenders when borrowers default on mortgage loans. As the Director found, "borrowers who are required to get mortgage insurance do not normally shop for it." *Id.* Instead, lenders designate the mortgage insurance company, and borrowers pay for the insurance, usually paying a monthly premium as part of each mortgage payment. *Id.* Thus, mortgage insurance companies typically depend on lenders to "refer" business to them; they do not market directly to borrowers, and borrowers do not seek them out. *Id.*

Until the collapse of housing prices in 2008, mortgage insurance was very lucrative. Initially, this did not benefit PHH, but by the mid-1990s, PHH had figured out a way to tap into these profits. It established Atrium Insurance Co. as a "captive" mortgage *re*insurer. *Id.* A mortgage reinsurer is supposed to assume some of the risk that would otherwise be borne by a mortgage insurer. *Id.* Beginning in 1995, PHH entered into contracts with mortgage insurers to provide them with reinsurance on loans originated by PHH. *Id.* To get this reinsurance, the mortgage insurer had to pay Atrium a portion of each monthly mortgage insurance premium paid by the borrower. *Id.* Under the arrangement PHH established, Atrium provided reinsurance only for mortgage insurers that insured mortgages generated by PHH, and only for PHH mortgages. *Id.*

There was direct evidence that PHH linked its referrals to these captive contracts – mortgage insurers knew that buying reinsurance from Atrium, a product they did not otherwise want, was a quid pro quo for referrals from PHH. From 1995 to 2001, PHH had only one captive contract with a single mortgage insurer, and it referred most of its loans that required mortgage insurance to that insurer. JA.4. But beginning in 2001, PHH had captive agreements with more than one mortgage insurer. It then assigned borrowers to the mortgage insurers that had captive contracts, sending more referrals to the mortgage insurers that were willing to pay more for Atrium's reinsurance. *Id.* When one of the mortgage insurers informed PHH that it would no longer purchase reinsurance from Atrium, PHH reduced by 99% its referrals to that company. *Id.*[2]

D. Proceedings before the Bureau

PHH's mortgage reinsurance arrangement came under government scrutiny before the Bureau came into existence. HUD began the investigation and referred it to the Department of Justice, which then transferred the matter to the Bureau after it obtained authority to enforce RESPA in 2011. *See* JA.341. The Bureau initiated

[2] After the housing crisis of 2008, mortgage insurance ceased to be profitable, and PHH wound down Atrium's reinsurance business. PHH Stay Mot. at 20.

the administrative proceeding against PHH in January 2014. JA.7. The Bureau alleged that PHH violated section 8(a) of RESPA because the reinsurance premiums paid by the mortgage insurers to PHH through Atrium were kickbacks for referrals. The Bureau further alleged that these kickbacks were at borrowers' expense – PHH steered mortgage insurance referrals to mortgage insurers that purchased reinsurance from Atrium even when PHH knew that other mortgage insurers offered lower prices for mortgage insurance.

After a nine-day trial, the ALJ issued his recommended decision, and concluded that PHH violated RESPA. JA.104. Both PHH and the Bureau's enforcement counsel appealed to the Bureau's Director. On June 4, 2015, the Director issued his 40-page Decision and Order and held that PHH's conduct satisfied all the elements of a violation of section 8(a) of RESPA – the mortgage reinsurance premiums were payments of "things of value," and PHH agreed to, and did in fact, refer borrowers to mortgage insurers in exchange for these payments. JA.12-14. Next, the Decision rejected PHH's contention that section 8(c)(2) of RESPA shields its conduct. JA.14-17. That section provides that "[n]othing in this section [*i.e.*, section 8] shall be construed as prohibiting … the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2). The Director interpreted that section to clarify that a violation of section 8(a) cannot be inferred based solely on the fact that a party receiving referrals purchases a service from a party making referrals. However, section 8(c)(2) does not apply where, as here, there is evidence that the payments for services were a quid pro quo for referrals, and therefore not bona fide.

The Director ordered both injunctive and equitable monetary relief. JA.39. The Order prohibits PHH from committing the sorts of violations that it committed in the past, and fences it in so that it cannot commit similar violations in the future. The Order also requires PHH to disgorge all the kickbacks that it received from mortgage insurers on or after July 21, 2008 (*i.e.*, to the limit of the Bureau's enforcement authority, *see* JA.10-12, but far short of the full extent of PHH's kickback scheme), approximately $109 million. The Order does not impose any civil penalty or other fine.

E. The panel's decision

PHH sought review. On October 11, 2016, the panel (per Judges Henderson, Kavanaugh, and Randolph) vacated the Director's Order and remanded for further proceedings. Before addressing PHH's liability under RESPA, the panel concluded that the Bureau's structure was unconstitutional because the Bureau is headed by a single Director removable only for cause. The panel noted that the Bureau's single-Director leadership departed from the "settled historical practice," of multi-member agencies. Op. at 8. This mattered to the panel because all agencies headed by individuals who may be removed only for cause "are unaccountable to the President." Op. at 55. So, "[i]n the absence of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head – a check that helps … protect individual liberty." Op. at 44. While that "substitute check" made multi-member independent agencies constitutional, the Bureau's single-Director structure threatened liberty in a way that violated the Constitution's separation of powers. Op. at 51.

The panel then held that the appropriate remedy was to sever the provision of the CFPA that made its Director removable only for cause, 12 U.S.C. 5491(c)(3). The panel also concluded that the Bureau could remain fully operative with a Director removable at will. *Id.*

The panel next addressed PHH's RESPA liability. It first focused on section 8(c)(2), which provides that "[n]othing in [section8] shall be construed as prohibiting … the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2). The panel interpreted this provision as creating a safe harbor for PHH's otherwise unlawful kickback scheme as long as the mortgage insurers paid no more for the reinsurance than its fair market value. Op. at 73. In the panel's view, such payments are "bona fide" even if the mortgage insurers "would have preferred not to purchase reinsurance at all." Op. at 74. The panel held that the Bureau's contrary interpretation was inconsistent with the unambiguous text of section 8(c), and it allowed no deference to the Bureau's interpretation. Op. at 78.

The panel also held that even if the Bureau's interpretation of RESPA were correct, it would violate due process to apply that interpretation to PHH's past conduct. Op. at 80. The panel concluded that its interpretation of section 8(c) was consistent with HUD's "repeated interpretation" of the section, and that HUD's interpretation was widely relied on by the mortgage lending industry. Thus, the panel faulted the Bureau for "*changing* the Government's longstanding interpretation … retroactively." Op. 86 (emphasis in original). Finally, the panel held that RESPA's three-year statute of limitations, 12 U.S.C. 2614, applied to the Bureau's administrative proceeding. Op. at 95.

Accordingly, the panel remanded the matter to the Bureau so that it could determine, consistent with the three-year statute of limitations, whether PHH had received more than "reasonable market value" for the reinsurance it sold. Op. at 100-101.

Judge Randolph concurred, but would also have held that the Bureau's administrative proceeding was unconstitutional because the ALJ was an inferior officer who was not properly appointed. Judge Henderson dissented as to the portion of the panel's opinion that held the Bureau's structure unconstitutional because she believed the panel could have avoided the issue.

STANDARD OF REVIEW

This Court should review the constitutional challenge de novo. *Mistretta v. United States*, 488 U.S. 361, 384 (1989). The Bureau's interpretation of RESPA is reviewed pursuant to the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

SUMMARY OF ARGUMENT

To avoid liability for an illegal kickback scheme that lasted nearly 18 years, PHH attacks the constitutionality of the for-cause removal provision that applies to the Bureau's Director. This attack comes in two parts: the first directed to the Bureau's functions, and the second focusing on the Bureau's single-Director structure. There is nothing about the functions that the Bureau performs that precludes its Director from being removable only for cause. In 1935, the Supreme Court upheld the constitutionality of for-cause removal for commissioners of the Federal Trade Commission (FTC). *Humphrey's Executor, supra*. The Court considered the functions performed by the FTC and held that for-cause removal did not interfere with the President's duty under Article II to take care that the laws be faithfully executed. Today, the Bureau performs functions that are remarkably similar to those performed by the FTC at the time of *Humphrey's Executor*. So the same circumstances that permit FTC commissioners to be removable for cause also apply to the Bureau's Director.

Nor does the Bureau's single-Director structure render it unconstitutional. Granted, most independent agencies have been headed by multi-member commissions. But Congress's departure from tradition is not unconstitutional because it does not diminish presidential control. Indeed the panel expressly recognized that the President has no less control over a single-Director agency than he does over a multi-member commission.

The constitutional separation of powers plays an important role in protecting individual liberty. But this does not support the panel's contention that, if a multi-member commission somehow better protects individual liberty, then a single-Director agency must be unconstitutional. The Bureau's structure does not interfere with the ability of any branch of government to perform its assigned functions, and therefore does not interfere with the separation of powers.

The panel also believed that, although for-cause removal renders *all* independent agencies too far removed from presidential control, multi-member agencies are salvaged because individual commissioners' check on one another can substitute for presidential control. But the Constitution charges the President with taking care that the laws be faithfully executed. Nothing in the Constitution permits a commissioner to substitute for the President.

In its brief as amicus curiae, the United States argues that, because the Bureau acts through a single Director, unlike a multi-member commission, the Bureau exercises quintessentially executive power that must be under direct presidential control. However, quintessential executive power is the power to interpret and implement laws passed by Congress. That is what multi-member agencies like the FTC do, and what the Bureau does. So neither PHH nor the United States has provided any basis for distinguishing the Bureau from Supreme Court precedent upholding the constitutionality of independent agencies.

If this Court determines that the Bureau’s structure is unconstitutional, it should sever the for-cause removal provision from the CFPA. The Dodd-Frank Act (the CFPA is Title X of Dodd-Frank) includes a severability clause, and severing the provision would not interfere with Congress’s goals in establishing the Bureau.

This Court cannot avoid addressing the Bureau’s constitutionality because the panel’s rulings regarding RESPA were incorrect and cannot provide an independent basis for vacating the Bureau’s Order. Even if it could avoid the issue, this Court should nonetheless address it because the issue is ripe and recurs with increasing frequency.

The panel erred with respect to PHH’s RESPA liability because section 8(c)(2) does not excuse PHH’s illegal kickbacks. That section clarifies that a bona fide purchase of a good or service from the party that makes the referrals of settlement service business is not, by itself, enough to infer a violation of section 8(a). But that is not what happened here. The payments that PHH received for mortgage reinsurance were in no way bona fide – in good faith. PHH sold reinsurance as a quid pro quo for referrals of settlement service business, *i.e.*, as a means of evading the prohibition of section 8(a). Actions taken to avoid a prohibition of law cannot be bona fide.

Although RESPA's statute of limitations imposes a three-year limit on enforcement "actions," this limit does not apply to the Bureau's administrative proceeding. When a statute of limitations is invoked to limit government enforcement, that statute should be strictly construed. And the Supreme Court has recognized that normally the word "actions" refers to actions brought in court, not to administrative proceedings.

PHH contends that, by holding it liable, the Bureau somehow offended fair notice by reversing a "longstanding" interpretation of RESPA. But what PHH refers to as a longstanding interpretation derives from a cryptic 1997 letter that HUD sent to another mortgage lender. And although in some instances such letters may constitute an agency interpretation, that is not so here because HUD specifically cautioned that the letter neither constituted agency guidance, nor could it be relied on as a defense to RESPA liability. Indeed, RESPA includes a good-faith defense, but HUD's regulations (which were subsequently adopted by the

Bureau) explained that a letter such as the 1997 letter cannot be the basis of such a defense.

Finally, if this Court were to hold in *Lucia* that the SEC's ALJ was an inferior officer, it should either seek additional briefing to determine whether that decision controls here, or it should uphold the Bureau's constitutionality, vacate the Bureau's Order without addressing PHH's liability under RESPA, and remand for further proceedings before a properly appointed ALJ.

ARGUMENT

I. THE BUREAU'S STRUCTURE IS CONSTITUTIONAL

Neither the Bureau's single-Director structure, nor the for-cause removal provision unduly interferes with the President's ability to take care that the laws be faithfully executed. Thus, the Bureau's structure does not violate Article II of the Constitution. But if this Court were nonetheless to hold the structure unconstitutional, the appropriate remedy would be the one imposed by the panel – severing the provision of the CFPA (12 U.S.C. 5491(c)(3)) that makes the Director removable only for cause.

A. For-cause removal is constitutional

The Bureau's Director is appointed for a five-year term, and is removable by the President "for inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3), *i.e.* for cause, not at will. These features do not violate Article II because they do not prevent the President "from accomplishing [his] constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

1. The CFPA's for-cause removal provision does not prevent the President from accomplishing his constitutional duties

In 1935, the Supreme Court upheld the provision of the Federal Trade Commission Act that gives the five FTC commissioners, who are appointed by the President to staggered seven-year terms, for-cause removal protection. That provision is nearly identical to the Director's for-cause protection.[3] *Humphrey's Executor*, 295 U.S. at 632; *accord Free Enterprise*, 561 U.S. at 477 ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

In *Morrison*, the Court applied *Humphrey's Executor* to uphold the constitutionality of a statute that provided for special prosecutors who could be removed only by the Attorney General and only for cause. Chief Justice Rehnquist, writing for the Court, explained that, when evaluating the constitutionality of such removal restrictions, the "real question" is whether they "are of such a nature that they impede the President's ability to perform his constitutional duty." 487 U.S. at 691; *see also id.* at 689-90 (explaining that this analysis "ensure[s] that Congress

[3] *Compare* 15 U.S.C. 41 *with* 12 U.S.C. 5491(c)(3).

does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II"). *Humphrey's Executor* reflected the Court's judgment that, given "the functions of the officials in question," "it was not essential to the President's proper execution of his Article II powers that [the FTC] be headed up by individuals who were removable at will." *Id.* at 691. The ability to terminate such officials "for 'good cause'" ensured that "the Executive … retains ample authority to assure that the [official] is competently performing his or her statutory responsibilities in a manner that comports with the [statute]." *Id.* at 692.

Moreover, insofar as *Humphrey's Executor* and *Morrison* turn on "the character of the office," *Humphrey's Executor*, 295 U.S. at 631, or "the functions of the officials in question," *Morrison*, 487 U.S. at 691, this case is indistinguishable from *Humphrey's Executor* because the Bureau's functions are quite similar to those of the FTC. At the time of *Humphrey's Executor*, the FTC had authority to prohibit "unfair methods of competition in commerce" by "persons, partnerships, or corporations, except banks and [certain common carriers]." 15 U.S.C. 45 (1934). To carry out that power, the FTC had "wide powers of investigation," *Humphrey's Executor*, 295 U.S. at 621, into the practices of "any corporation engaged in commerce," 15 U.S.C. 46(a) (1934). This included the power to issue subpoenas. 15 U.S.C. 49 (1934). If the FTC believed that any person, partnership, or corporation was engaging in an unfair method of competition, it could initiate an administrative proceeding (*i.e.*, in what PHH would presumably refer to as the FTC's "in-house court," *see* Opening Brief for Petitioners (Br.) at 18, 25) and, after a hearing, issue an order requiring the party to cease and desist from any practices it had determined were unlawful. 15 U.S.C. 45 (1934). If the party failed to obey the order, the FTC could bring an action in a court of appeals seeking enforcement. *Id.* The FTC could also gather information regarding corporate practices and report on that information to Congress. 15 U.S.C. at 46(f) (1934).

In *Humphrey's Executor*, the Court focused on the FTC's responsibility in "filling in and administering the details embodied by that general standard [*i.e.*, the FTC Act]." 295 U.S. at 628. And although the Court referred to the FTC's functions as "quasi legislative or quasi judicial," *id.* at 628, the Court subsequently explained that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28.

The Bureau's functions are not meaningfully different from those performed by the FTC in 1935, although the Bureau operates within a narrower slice of the economy. The Bureau enforces the "federal consumer financial laws" that pertain to consumer financial products and services, 12 U.S.C. 5481(14), 5511, and, like the FTC, may prohibit "unfair" (as well as deceptive and abusive) acts and practices – but only against "covered persons," or "service providers" who engage in those practices in connection with consumer financial products or services. 12 U.S.C. 5531(a), 5536(a). The Bureau may issue subpoenas or civil investigative demands. 12 U.S.C. 5562(b), (c). It may initiate administrative proceedings or actions in court to enforce the laws within its authority. 12 U.S.C. 5563, 5564. The Bureau may also collect and publish information relevant to the functioning of markets for consumer financial products and services; conduct financial education programs; collect and respond to consumer complaints; and issue rules and guidance to implement consumer financial laws. *Id.* at 5511(c). Thus, the Bureau's functions, like the largely similar functions of the FTC in 1935, are not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law" that the Bureau's Director be terminable at will by the President. *Morrison*, 487 U.S. at 691-92. Accordingly, the "certain circumstances," that allowed FTC commissioners to be removable for cause, *see Free Enterprise*, 561 U.S. at 483, also prevail at the Bureau.[4]

[4] PHH slides into hyperbole when it contends that "[t]he Director sits atop his own parallel government with broad dominion over consumer finance but without constitutional accountability." *See* Br. at 26. In addition to the President's authority to remove the Director for cause, the Bureau's administrative orders may be challenged in court, 12 U.S.C. 5563(b)(4), its compulsory process is not self-enforcing, *id.* at 5562(e), and other final actions that the Bureau takes are subject to

The Court's decision in *Free Enterprise* supports the constitutionality of the Bureau's structure in a different way. The Court held that the Public Company Accounting Oversight Board was unconstitutional because there were two layers of for-cause removal between the President and Board members, and, as a result, the President could not take care that the laws administered by the Board be faithfully executed. *See* 561 U.S. at 514. (Members of the Board could be removed only for cause, and only by the Securities and Exchange Commission (SEC), not by the President. And members of the SEC could only be removed by the President for cause.) So the Court remedied this flaw simply by severing one of the layers of for-cause removal protection (the one between the SEC and the Board). Thus, "the President [was] separated from Board members by only a single level of good-cause tenure." *Id.* at 509. This was sufficient to preserve the President's power over the Board, an agency "with expansive powers to govern an entire industry." *Id.* at 485. The President has at least as much control over the Bureau as he does over the (restructured) Board.[5]

---

review pursuant to the Administrative Procedure Act. Further, Congress may at any time alter the Bureau's funding, its structure, or its authority.

[5] Nor do 12 U.S.C. 5492(c)(4) or 12 U.S.C. 5512(b)(4) unduly impinge on the President's authority. *See* Br. at 24. The first merely permits the Bureau to submit a legislative recommendation to Congress without approval of the President so long as the recommendation makes clear that it does not necessarily contain the views of the President. Section 5492(c)(4) does not restrict the President's authority to express his own views as to any matter. Section 5512(b)(4) addresses the deference

2. The Bureau's single-director structure does not prevent the President from accomplishing his constitutional duties

Humphrey's Executor blessed for-cause removal for the commissioners of an independent agency. It makes no difference if that independent agency is headed by a single individual.

The panel, PHH, and the United States attempt to distinguish *Humphrey's Executor* and its progeny based on the Bureau's single-Director structure, but none of their arguments withstands scrutiny. According to the panel, "[t]he independent status of an independent agency erects a high barrier between the President and the independent agency regardless of how many people head the independent agency on the other side of the barrier." Op. at 57. In light of the binding Supreme Court precedent holding that such barriers are not *unconstitutionally* high, the panel and PHH seek to distinguish the Bureau on two bases: independent agencies have traditionally operated as multi-member bodies, Op. at 27-35, and a multi-member structure – while not creating a "meaningful difference in responsiveness or accountability to the President," Op. at 56 – provides a structural check on agency action that is somehow constitutionally required, Op. 43-53. The United States takes a different course, arguing that the Bureau's single-Director leadership gives

---

that courts should accord to the Bureau's interpretation of an ambiguous provision of the consumer financial laws relative to the interpretations of other agencies that have enforcement responsibility for the same laws. It has nothing to do with the President's authority to influence the Bureau's interpretation.

it a "quintessentially executive structure" that multimember bodies do not share, and for that reason, its Director must be removable at will. Brief for the United States as Amicus Curiae U.S. Amicus (U.S. Br.) at 13. There is no merit to any of these arguments.

a. With respect to tradition, the panel contended that the Bureau's single-director structure is "the first of its kind and a historical anomaly." Op. at 27, *see also* Br. at 23.[6] "Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385. This is particularly so when, as here, the panel's anomaly has no bearing on the only pertinent inquiry: whether the Bureau's structure "interfere[s] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 690. The Court long ago held that a for-cause removal provision does not, *per se*, interfere with the President's authority under Article II. *See Humphrey's Executor*, 295 U.S. at 632; *Morrison*, 487 U.S. at 691. So even if the for-cause removal protection for the Bureau's single Director were anomalous, that would not violate the Constitution.

[6] In fact, it is not. As the panel recognized, there are three other independent agencies that are headed by single individuals removable only for cause. *See* Op. at 29-33 (discussing the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency).

The Supreme Court has never indicated that for-cause removal is permissible only when the officer's actions are checked by fellow members of a collegial body. Indeed, in *Morrison*, the Court upheld the constitutionality of the independent counsel, a single individual who could be removed (by the Attorney General) only for cause, and who, with respect to all matters within her jurisdiction, had "'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'" 487 U.S. at 662 (quoting 28 U.S.C. 594(a) (1988)).[7] Further, in upholding the constitutionality of the independent prosecutor, the Court made no reference to any historical antecedent.

The panel cited numerous cases that rely on historical practice when addressing separation-of-powers issues, *see* Op. at 36-38, but primarily focused on *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and *Free Enterprise*, *supra*. In neither case did the Court base its decision on historical practice with respect to an irrelevant factor. *Noel Canning* addressed the length of a Senate recess necessary to permit recess appointments. 134 S. Ct. at 2556. The Court looked to historical practice with respect to the length of recesses in which the President had made recess appointments to help determine the meaning that the Framers gave to the term "the recess of the Senate" in the Recess Appointments Clause. *Id.* at 2566. As explained above, *Free Enterprise* addressed the constitutionality of a double layer of for-cause removal, and the Court considered historical practice in deciding whether such a restriction interfered too much with the President's ability to take care that the laws be faithfully executed. 561 U.S. at 505. The Court concluded that the dual-layer of for-cause protection was unconstitutional not because it was an historical anomaly, but because that feature "stripped [the President] of the power our precedents have preserved, and his ability to execute the laws – by holding his subordinates accountable for their conduct – is impaired." *Id.* at 496. In both of those cases (and in the others cited by the panel), the Court considered historical practice with respect to a relevant factor. Here, historical practice with respect to single-Director structure is not helpful because that aspect of the Bureau's structure does not undermine the President's ability to carry out his responsibilities under Article II.

---

[7] PHH mistakenly contends that, unlike the independent counsel in *Morrison*, the Director does not have limited jurisdiction or tenure. *See* Br. at 24. In fact, the Director's term is limited to five years, and his authority is limited by the scope of the laws the Bureau enforces. The independent counsel could prosecute certain high-ranking government officials for violations of virtually any federal criminal law (except certain misdemeanors), 28 U.S.C. 591(c) (Supp. V 1987). And the term of the independent counsel was limited only by the length of the investigation. *See In re: Cisneros*, 454 F.3d 342 (D.C. Cir. 2006) (granting a fee application for an independent counsel investigation that lasted more than 10 years).

b. The panel next touted the benefits of "structuring independent agencies as multi-member commissions or boards," Op. at 43, because it believed that "independent agencies are unaccountable to the President," regardless of whether the agency is headed "by one, three, or five members." *See* Op. at 55, 56. Why would a multi-member panel pass constitutional muster, if one headed by a single director would not? The panel's answer had nothing to do with a lack of presidential accountability – the panel even recognized that, as between an agency headed by an individual and one headed by a multi-member commission, "there is no meaningful difference in responsiveness and accountability to the President." Op. at 56. So the panel introduced two new theories: "multi-member commissions or boards … reflect[] a deep and abiding concern for safeguarding the individual liberty protected by the Constitution," *id.* at 43, and "[t]o satisfy Article II, the check on an agency must come from the President or from other internal Executive Branch or agency checks, not from Congress," *id.* at 63.

As to the first theory, the panel viewed the separation-of-powers analysis through the lens of safeguarding individual liberty. To be sure, as the Court explained in *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), "the declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty." (Internal quotation marks omitted.) But that does not mean that courts have license to superimpose their own views of what best protects liberty on top of the checks and balances that the Framers designed. Instead, courts must ensure that the Framers' design is honored – which by itself protects liberty.

Indeed, as the United States argued in support of the Bureau's Petition for Rehearing, the Supreme Court has never suggested that courts should "undertake an additional inquiry" into whether an agency's structure somehow threatens individual liberty. Resp. of the United States to Pet. for Reh'g En Banc at 9-10. Here, the Bureau's structure does not interfere with the President's power to take care that the laws be faithfully executed, nor does it interfere with any other branch's ability to perform its constitutionally assigned functions.[8] So the Bureau's structure does not infringe the Constitution's separation of powers provisions – or the individual liberty that those provisions are designed to secure.

---

[8] Because the Bureau is funded by transfers from the earnings of the Federal Reserve System, 12 U.S.C. 5497(a), PHH contends that Congress has thereby "abdicated" its control "through the power of the purse." Br. 16, *see also id.* at 1, 2, 26. But other financial regulators are funded outside the annual appropriations process, *see, e.g.*, 12 U.S.C. 243 (Federal Reserve System funded with fees paid by member banks), and there is no abdication because "Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time)." Op. at 64 n.16. Separation-of-powers principles do not preclude Congress from funding agencies outside the annual appropriations process. *See Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004) (explaining that "Congress may … decide not to finance a federal entity with appropriations," but rather through some other funding mechanism). PHH cites the Appropriations Clause, see Br. at 27, but that clause is a limit on the Executive, not on Congress. *See In re Aiken Cnty.*, 725 F.3d 255, 262 n.3 (D.C. Cir. 2013). It also cites the Origination Clause and the Taxing and Spending Clause, Br. at 27, but neither has anything to do with the Bureau's funding. PHH additionally argues that even if the Bureau's structure and funding are not independently unconstitutional, this Court should examine these features "holistically" and hold the Bureau unconstitutional. Br. at 28. But the cases it cites, *Ass'n of Am. R.R.s v. DOT*, 721 F.3d 666 (D.C. Cir. 2013), and *Free Enterprise*, *supra*, concerned features that, taken separately, raised no constitutional problem, but became problematic in combination because they undermined the same constitutional protection. That is not the case here – and neither the panel nor PHH offered any argument for how the Bureau's funding, when combined with the for-cause removal protection for the Bureau's single

As to the second theory, the Constitution tasks the President, not other members of a multi-member commission, with taking care that the laws be faithfully executed. The panel claimed that "[t]he check from other commissioners or board members *substitutes* for the check by the President." *Id.* at 53 (emphasis added). That is not consistent with Article II. The issue here is whether *the President's* power has been unconstitutionally limited. Even if fellow commissioners can keep an eye on one another, that does not give *the President* any greater power. If a multi-member commission is somehow interfering with the President's constitutional authority, that interference cannot be remedied by the members of the commission itself.

The panel touted what it contended are benefits of a multi-member structure: no single commission member "possesses authority to do much of anything," Op. at 44; multi-member commissions foster more deliberative decision-making, Op. at 45; multi-member structure "helps to avoid arbitrary decisionmaking," Op. at 46; and multi-member commissions are better at avoiding regulatory capture, Op. at 47. These might be reasons why Congress would choose, as a matter of policy, to

---

Director, impedes any branch of government in performing its responsibilities under the Constitution or otherwise undermines a constitutional protection.

head an agency with a multi-member commission, but none of them makes a single-member agency less accountable to the President. And the panel (and PHH, *see* Br. at 22-23) simply ignored the features of a single-member agency that make it *more* accountable to the President – with a single-member agency, the President always knows who is responsible for the agency's actions.[9] But at a multi-member agency, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enterprise*, 561 U.S. at 498 (quoting The Federalist No. 70, p. 476 (J. Cooke ed. 1961)).

c. In its merits brief, as distinguished from its brief in support of the petition for rehearing en banc, the United States retreats to the characterization of administrative agencies in *Humphrey's Executor* and argues that for-cause removal may be applied only to those agencies that act "in part quasi-legislatively and in part quasi-judicially." U.S. Br. at 8. Why did the Court in 1935 apply this characterization to the FTC? Because, according to the Court, the FTC was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Humphrey's Executor*, 295 U.S. at 628; *see also Morrison*, 487 U.S. at 689 n.28. That, of course, is exactly what the Bureau does, and what "would at the present time be considered 'executive.'" *Morrison*, 487 U.S. at 689 n.28. The United States notes that the Court also focused on the structural features of the FTC as a "body of experts" composed of multiple members with staggered terms. But there were two distinct parts to the Court's decision in *Humphrey's Executor* – first, the Court addressed whether, as a matter of statutory construction, the FTC Act precluded the President from removing commissioners at will, 295 U.S. at 621-26, and second, the Court addressed whether for-cause removal was constitutional, 626-32. The Court's discussion of the FTC's structure comes in the statutory interpretation part of the decision and appears nowhere in the Court's constitutional analysis.

---

[9] The panel was concerned that "[a] President may be stuck for his or her entire four-year term with a single director appointed by a prior President." Op. at 58. However, because the five FTC commissioners serve staggered terms of seven years (and did so at the time of *Humphrey's Executor*), the President would often be unable to nominate a majority of commissioners during a term in office. Indeed, members of the Board of Governors of the Federal Reserve System, who may be removed by the President only for cause, serve 14-year terms. 12 U.S.C. 241, 242.

The United States also tries to distinguish the Bureau from the FTC by arguing that, because the Bureau is headed by a single Director, it exercises "quintessentially executive power," *i.e.*, it exercises power in a manner that must be within the President's direct control. U.S. Br. at 13. In fact, the quintessence of executive power is the power to interpret and implement a legislative mandate. *See Bowsher v. Synar*, 478 U.S. at 733. That is what the FTC does through its five-member commission (and what it did in 1935), and that is what the Bureau does through its single Director. And although the United States fears that, if this Court upholds the Bureau's structure, it risks the demise of the "'general' rule of *Myers* [*v. United States*, 272 U.S. 52 (1926)]," *see* U.S. Br. at 14, there is no "general" rule in *Myers*, because *Myers* was greatly limited by *Humphrey's Executor*. 295 U.S. at 626; *see Morrison*, 487 U.S. at 687 n.24. Instead, the "general" rule is that "the Constitution did not give the President illimitable power of removal over the officers of independent agencies." *Morrison*, 487 U.S. at 687 (internal quotation marks omitted). The Bureau's structure is fully consistent with this "general" rule.

B. If this Court holds the Bureau's structure unconstitutional, the proper remedy is to sever the for-cause-removal provision from the CFPA

If this Court holds that the Bureau's structure is unconstitutional, the appropriate remedy is to sever the for-cause-removal provision, 12 U.S.C. 5491(c)(3), from the CFPA. The Supreme Court adopted a similar remedy in *Free Enterprise*, reasoning that "when confronting a constitutional flaw in a statute" the appropriate course of action is to "sever the problematic portions while leaving the remainder intact." 561 U.S. at 508. Congress would have expected the same remedy here because it included an express severability provision in the Dodd-Frank Act.[10] 12 U.S.C. 5302; *see* Op. at 66-67. And, as in *Free Enterprise*, even if

[10] There is no basis for PHH's contention that Dodd-Frank's severability clause does not apply to Title X of that Act, *i.e.*, the CFPA. *See* Br. at 31.

the for-cause-removal provision were severed from the CFPA, the Bureau could continue to function in the manner intended by Congress. Op. at 67-68.

PHH contends that severing section 5491(c)(3) would transform the Bureau into an agency that Congress never intended, Br. at 30, but it misunderstands Congress's intent. In fact, Congress created the Bureau so that enforcement and implementation of consumer financial laws would no longer be spread among seven separate regulators, some of whom "routinely sacrificed consumer protection for short-term profitability of banks." S. Rep. 111-176 at 15 (internal quotation marks omitted). This resulted in "conflicting regulatory missions, fragmentation, and regulatory arbitrage." *Id.* at 10, *see* 12 U.S.C. 5511(b)(4). Severing section 5491(c)(3) will not interfere with Congress's primary goal of "assuring accountability." *Id.* at 11.

II. THIS COURT SHOULD ADDRESS THE CONSTITUTIONALITY OF THE BUREAU'S STRUCTURE

"A fundamental and long standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). In her concurrence, Judge Henderson suggested that the panel's rulings regarding RESPA provided a sufficient basis to vacate the Order and that therefore, the Court need not reach the separation-of-powers issue. Henderson, J., concurring at 8. For the reasons discussed below, the panel erred in its holdings that would have provided an independent basis for vacating the Bureau's Order. So these rulings provide no basis for avoiding the separation-of-powers issue.

But even if the Court were to adopt one of the panel's alternative bases for vacating the Bureau's Order, it should nonetheless reach the separation-of-powers issue. Constitutional avoidance is discretionary, and, in appropriate circumstances, a court may address an issue that it might be able to avoid – such as where the issue "crops up with some frequency." *See Beringer v. Sheahan*, 934 F.2d 110, 112 (7th Cir. 1991). The Bureau's constitutionality has been challenged frequently, but has yet to be addressed by a court of appeals. *See, e.g., State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016) (court held the issue of the Bureau's constitutionality in abeyance pending the resolution of this case); *CFPB v. ITT Educ. Servs.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508 (S.D. Ind. Mar 6, 2015) (upholding the constitutionality of the Bureau's structure); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (same). Accordingly, even if this Court could, on statutory grounds, vacate the Bureau's Order, it should address the Bureau's constitutionality – the issue has been fully briefed, it recurs with increasing frequency elsewhere, and is ripe for decision.

A. The Director correctly interpreted RESPA

1. PHH's kickback scheme violated RESPA

The panel's interpretation of RESPA was incorrect. Its crucial error was holding that the meaning of section 8(c)(2) of RESPA – in particular, the term "bona fide" in that provision – is unambiguous. Op. at 73. Even a cursory reading of the section shows that its meaning is not clear. The Director's reasonable interpretation is entitled to deference. *See Chevron*, 467 U.S. at 842-43 (1984).[11] Applying that interpretation, PHH's liability is apparent.

Section 8(a) provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement … that [real estate settlement service] business … shall be referred to any person." 12 U.S.C. 2607(a). That is exactly what PHH did – the reinsurance premiums it received (which amounted to more than $450 million between 1995 and 2013, s*ee* JA.214, 221), easily fit within the broad definition of "thing of value," *see* 12 C.F.R. 1024.14(d), and those premiums were paid pursuant to an agreement: the mortgage insurers were well aware that, to get referrals from PHH, they had to pay those premiums,

[11] PHH would deny any deference to the Director's interpretation because RESPA can be (although it rarely is) criminally enforced. *See* Br. at 44 n.8. But the Supreme Court has deferred to an agency's interpretation of a civil statute that can be criminally enforced. *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or.*, 515 U.S. 687, 703-04 (1995). That is the situation here.

and the record amply demonstrated that PHH required them to do so as a quid pro quo. JA.4-5.

Section 8(c)(2) does not unambiguously excuse conduct that would otherwise violate section 8(a). *See* Br. at 42. It provides that "[n]othing in this section [*i.e.*, section 8] shall be construed as prohibiting … the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). According to PHH, this section "unambiguously," Br. at 40, permits it do precisely what section 8(a) forbids – demand kickbacks for referrals so long as those kickbacks are in the guise of payments for a service, even a service that, as in this case, is unwanted, even a service that, as in this case, is purchased solely as a condition for securing referrals. The Director rejected PHH's interpretation. JA.15-17. He noted that section 8(c)(2) begins with the phrase "[n]othing in this section shall be construed as," which indicates that the section serves to "clarify the application of section 8(a)." JA.15,17. Section 7 of RESPA, 12 U.S.C. 2606, "uses the word 'exempt' to create an exemption," but section 8(c)(2) does not, thereby indicating that the section is intended as something other than an exemption – it does not excuse conduct that would otherwise violate Section 8(a). It is intended instead as an interpretive tool. JA.15. The Director also explained how PHH's reading of the section renders surplusage other portions of section 8(c) (including sections 8(c)(1)(B), 8(c)(1)(C)), and is at odds with the stated goals of RESPA. JA.16, 19. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (a court's "duty … is to construe statutes, not isolated provisions").

The Director explained that parties to illegal kickback agreements are unlikely to put those agreements into writing. JA.16. So those agreements may have to be identified based on circumstantial evidence and inference. But section 8(c)(2) clarifies that it is not proper to infer that an illegal agreement violates section 8(a) merely because a party that received referrals makes payments to a party that made the referrals. The key question posed by section 8(c)(2) is whether such payments are "bona fide." Given the purposes of RESPA, the Director interpreted "bona fide" to mean that a payment must be made in good faith, not as a quid pro quo for referrals.

The panel concluded, Op. at 73-74, and PHH argues, Br. at 40-41, that it is unambiguously clear that a payment is bona fide pursuant section 8(c)(2) if it is for fair market value. That is, so long as the mortgage insurers paid fair market value for the reinsurance, even if they did not want the reinsurance, and even if buying the reinsurance was a condition of receiving referrals from PHH, the purchase was bona fide, and would therefore provide a defense to liability under section 8(a).[12]

---

[12] PHH asserts that the kickbacks did not increase costs to consumers. *See* Br. at 10. Even if this were true, it is irrelevant. *See* 12 C.F.R. 1024.14(g)(2) ("[t]he fact

That is not the better reading of the statute, let alone the only one. "Bona fide" literally means "in good faith," it does not mean "fair market value."

McDonald v. Thompson, 305 U.S. 263 (1938), is instructive as to the meaning of "bona fide." That case involved a federal statute that required common carriers to obtain a certificate of convenience from the Interstate Commerce Commission (ICC) but limited the ICC's authority to deny a certificate to a carrier that was "in bona fide operation" as of the effective date of the statute. A carrier that had been operating in violation of applicable state law claimed that it was nonetheless in "bona fide operation." The Court disagreed:

> Exact definition of "bona fide operation" is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure …. The expression, "in bona fide operation," suggests absence of evasion….

Id. at 266. *McDonald* teaches that, when assessing whether a transaction is bona fide, purpose counts. *See also* 12 C.F.R. 1024.5(b)(7) (for purposes of RESPA, "[i]n determining what constitutes a *bona fide* transfer, the Bureau will consider … the real interest of the funding lender"). Here, of course, evading section 8(a)'s prohibition of kickbacks was the very purpose of the reinsurance PHH sold.[13]

---

that the transfer of the thing of value does not result in an increase in any charge … is irrelevant in determining whether the act is prohibited.")

[13] PHH cites several cases that it contends support its interpretation of "bona fide," but none does. *See* Br. at 41. In each of those cases, the party receiving referrals

PHH also claims that section 1024.14(g)(2) of Regulation X, 12 C.F.R. 1024.14(g)(2), allows it to accept kickbacks. *See* Br. at 41, 44 n.8. But PHH's interpretation of that section is based on a logical fallacy.[14] Section 1024.14(g)(2) states that, if a payment "bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for goods or services actually performed or provided." This does not mean that, if the payment *does* bear a reasonable relationship to the value of the services provided, then those payments are never for referrals. The real issue is whether the payments were conditioned on referrals, and in this case, they were.

2. RESPA's statute of limitations does not apply

The panel held that RESPA's statute of limitations, 12 U.S.C. 2614, imposes a three-year limit on the Bureau's action against PHH. Op. at 90-100; *see* Br. at 45-

---

paid for services provided by the party making the referrals, and the courts refused to infer that those payments, without more, established a violation of RESPA. But here, there is more – direct evidence, not disputed by PHH, that its sale of reinsurance was a quid pro quo for referrals. *See* JA.4 (discussing the evidence of a direct link between referrals and payments for reinsurance). Thus, there is no need for an "inventive mind[]," *see* Br. at 43, to show that the payments PHH received were kickbacks.

[14] The fallacy is known as "denying the antecedent." *See New Eng. Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370 (D.C. Cir. 2013) (*P* implies *Q* does not mean that *not P* implies *not Q*).

46.[15] This was error. Section 2614 provides a limitations period for "[a]ny action brought under [certain provisions of RESPA] in the United States district court or any court of competent jurisdiction." As *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006), explains, the word "action" normally refers to court actions, not administrative proceedings such as the one the Bureau brought against PHH.

There is no doubt that when Congress enacted RESPA, it intended the statute of limitations to apply to civil actions, which were the only way that HUD could enforce the statute. But the CFPA gave the Bureau the option to enforce the statute through administrative proceedings such as the one the Bureau conducted here. There is no reason to believe that Congress intended to apply the existing statute of limitations to such proceedings. PHH contends that, because the CFPA sometimes uses the word "action" to "encompass both judicial 'actions' and administrative enforcement 'actions,'" Br. at 45; *see* Op. at 95-96, section 2614 should also apply to both administrative proceedings and court actions. But whenever the CFPA uses the word "action" to refer to an administrative adjudication, it accompanies the word "action" with the adjective "administrative."

---

[15] The CFPA itself imposes no limitation on the Bureau's administrative proceedings. The section of the CFPA authorizing the Bureau to bring enforcement actions in federal courts contains a statute of limitations. 12 U.S.C. 5564(g). But the Bureau's administrative proceedings are authorized by a separate section of the CFPA, which has no statute of limitations. *See* 12 U.S.C. 5563.

See, *e.g.*, 12 U.S.C. 5497(d)(1); 5565(c) (caption). As the Court explained in *BP America*, this undercuts PHH's argument since none of these examples

> uses the term 'action' standing alone to refer to administrative proceedings. Rather, each example includes a modifier of some sort, referring to an 'administrative action' …. This pattern of usage buttresses the point that the term 'action,' standing alone, ordinarily refers to a judicial proceeding.

549 U.S. at 93. The Director followed this precedent, the panel did not. The panel's conclusion, moreover, flies in the face of the well-established principle that "[s]tatutes of limitation sought to be applied to bar rights of the government, must receive a strict construction in favor of the government." *E.I. Du Pont Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *accord BP Amer.*, 549 U.S. at 95-96.

PHH also contends that, without a statute of limitations, exposure to enforcement actions by the Bureau might never end. Br. at 45; *see also* Op. at 100. However, there is no dispute that 28 U.S.C. 2462, which applies to both actions and proceedings, imposes a five-year limitation on the Bureau's authority to obtain any "civil fine, penalty, or forfeiture." The Federal banking agencies' administrative proceedings are subject only to the statute of limitations set forth in 28 U.S.C. 2462. *See, e.g., Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000). There is no indication that this has encouraged these agencies to bring stale cases, or that when Congress essentially cut and pasted these agencies' administrative enforcement authority into the CFPA, *compare* 12 U.S.C. 1818(b) *with* 12 U.S.C.

5563(b), it intended for a different statute of limitations to apply. Thus, the Bureau's interpretation is entirely consistent with the longstanding principle that "the sovereign is exempt … from the operation of statues of limitations" unless the sovereign is expressly covered – a principle that serves "the great public policy of preserving the public rights … from injury and loss, by the negligence of public officers." *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938).

3. PHH violated RESPA every time it accepted a payment for reinsurance

As explained above, every month when a borrower paid a mortgage insurance premium, the mortgage insurer kicked back a portion of that premium to PHH to pay for reinsurance. However, PHH argues that, if it violated RESPA, it did so only with respect to those mortgages that closed within the limitations period (*i.e.*, on or after July 21, 2008, *see* JA.10-12). Br. at 47-49. (The panel chose not to address this issue. *See* Op. 100 n.30.) The ALJ accepted PHH's argument, and, as a consequence, awarded $6 million in disgorgement. The Director disagreed and ordered PHH to disgorge $109 million, not as a matter of caprice, as some might have it, but rather because the two distinctly different interpretations of section 8(a) necessarily result in two distinctly different outcomes. The Director interpreted section 8(a) in accordance with its text. Section 8(a) prohibits persons from "accept[ing] any … kickback." So PHH consummated its violations of RESPA every time it "accept[ed]" a kickback, not just when it closed loans, or not just when it entered into agreements with mortgage insurers. *See* JA.22-23. Accordingly, the Director required PHH to disgorge every kickback payment it received within the limitations period, regardless of when the mortgage closed. When the housing crisis began, PHH rapidly wound down its reinsurance business. This explains the lower amount awarded by the ALJ – PHH provided reinsurance to a relatively small number of mortgages that closed after July 2008. However, even after 2008, PHH continued to collect reinsurance premiums on a substantial number of mortgages that had closed years earlier. Thus, the larger amount awarded by the Director.

PHH contends that this interpretation of section 8(a) could have "a profound effect" with respect to its liability in private lawsuits. *See* Br. at 48. But there is no "profound effect." Each time PHH accepted a kickback payment, it violated RESPA, PHH was exposed to liability as to that violation, and the statute of limitations began to run *as to that violation*. Section 8(a) dictates this result – since private lawsuits have a one-year statute of limitations, a consumer could only challenge the kickback payments made during the previous year.

The appellate court decisions cited by PHH do not help its cause. *See* Br. at 49. In *Cunningham v. M&T Bank Corp.*, 814 F.3d 156 (3d Cir. 2016), the court rejected plaintiffs' claim that equitable tolling should excuse their failure to file within the statute of limitations. The court assumed, and plaintiffs never disputed, that the violations occurred at closing. *Snow v. First American Title Insurance Co.*, 332 F.3d 356 (5th Cir. 2003), involved title insurance, not mortgage insurance. Unlike here, the borrower in *Snow* paid for the settlement service (title insurance) in full at closing, the title insurer paid the kickback in full at closing, and that was when RESPA was violated.

Thus, PHH can only rely on *Mullinax v. Radian Guaranty Inc.*, 199 F. Supp. 2d 311 (M.D.N.C. 2002), which involved facts similar to this case. In that case, the court held that a "violation occurs when the borrower is overcharged by a provider of settlement services," *i.e.*, "at the closing settlement." *Id.* at 324-35. But this analysis is divorced from the wording of RESPA because section 8(a) prohibits the "giv[ing]" or the "accept[ing]" of an illegal payment by a settlement service provider, not the overcharging of the consumer.

However, a more recent case, also involving mortgage reinsurance, got it right. The court, citing the Director's Decision, distinguished:

> between situations where borrowers pay insurance policies at one time "in full" as compared to captive reinsurance schemes where borrowers pay for insurance as a part of each and every mortgage payment. … In the former situation, it makes sense to apply RESPA's statute of limitations to that one event: the payment of the policy in full. In the latter situation, however, it defies the plain language of [section 8(a)] to not consider each prohibited kickback or referral a separate violation capable of resetting the limitations period.

White v. PNC Fin. Services Group, Inc., CV 11-7928, 2017 WL 85378 at *6 (E.D. Pa. Jan. 10, 2017). Thus, the court recognized that, just as here, a lender violates

RESPA every time it accepts a payment for reinsurance where, pursuant to an agreement, that payment is a kickback for a referral.

B. Sanctioning PHH for its RESPA violations does not offend fair notice

The Director's Order enjoins PHH from accepting kickbacks, and imposes fencing in so that PHH will not commit similar violations in the future. The Order also requires PHH to disgorge $109 million, all the illegal kickbacks it received on or after July 21, 2008.[16] PHH argues, however, that it cannot be held liable because it acted "in reliance on prior agency precedent," and that it would be "[in]consistent with fundamental principles of fair notice" to hold it liable. Br. at 50. The panel agreed, and held that even if the Bureau's interpretation of RESPA were permissible, it could not be applied retroactively to PHH's conduct. Op. at 89. The panel was clear that this holding represented an alternative basis for vacating the Bureau's Order. Id. at 89 n.26.

---

[16] PHH contends that any award of disgorgement must be reduced by the value of the reinsurance it provided. Br. at 49 n.9. That is wrong. The remedy of disgorgement requires the wrongdoer to pay the "total billings that [it] received ..., without deducting monies paid by [it] to other parties." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011). PHH also argues that any injunctive relief must be limited to a prohibition of its violations. The injunctive relief imposed by the Bureau, JA.39-40, prohibits PHH's violations, as well as acts that are similar to those violations. This is appropriate because a party that has been held to have violated the law "must expect some fencing in." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957). Finally, although PHH contends that the Bureau lacks authority to award disgorgement, Br. at 49 n.9, it ignores 12 U.S.C. 5565(a)(2)(D), which gives the Bureau precisely that authority.

And what was the "agency precedent" on which PHH claims it relied for its interpretation of RESPA? Primarily, it was an unpublished 1997 letter by a HUD official, JA.251, that discussed captive reinsurance agreements and that was addressed to a mortgage originator who is not a party to this proceeding.[17] Br. at 52-55; Op. 72. Moreover, as the Director explained, that letter was no model of clarity – it contains statements that appear to be internally inconsistent. JA.18. (Indeed, PHH and the panel conveniently ignore that, on page one, the letter cautions that payments for reinsurance must be "solely" for reinsurance, JA.251, unlike the payments PHH received.) Even more important, HUD explained in a regulation that, unless HUD chose to publish a document in the Federal Register (the 1997 letter was never published), that document was "unofficial," it would not constitute a "rule, regulation or interpretation," and would "provide no protection" from liability under RESPA. 24 C.F.R. 3500.4(a)(2), (b) (1997). See JA.17. (The Bureau republished those regulations as 12 C.F.R. 1024.4(a)(2), (b) (2012), so the letter's status remained unchanged.) PHH simply ignores these regulations, and it has offered no reason why this Court should give the 1997 letter a status that HUD never intended it have and expressly warned industry it would not have.

[17] Although PHH now claims it relied on the 1997 letter, it told a different story in *Munoz v. PHH Corp.*, No. 1:08-cv-759 (E.D. Cal.), where it advised the court that the letter "does not constitute formal agency guidance and, as such, it is not entitled to any deference." Defendants Objections to Magistrate Judge's Findings and Recommendations at 17, ECF No. 233 (May 30, 2013).

Indeed, there is another good reason why this Court should not permit PHH to use the letter as a shield. Agencies need flexibility when responding to requests for compliance advice. *See Nat'l Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (recognizing the value of informal agency staff guidance). This advice can take the form of a rule, or formal guidance. But agencies must also be able to respond informally, perhaps even rapidly, to a specific request. So the agency may permit its staff to respond, but may want to make sure that staff advice does not bind the agency prospectively.[18] That is the purpose of 24 C.F.R. 3500.4(b) – HUD did not want to be bound by informal letters such as the 1997 letter. Presumably, HUD would have declined to take action against the recipient of the letter, but neither HUD nor the Bureau should be precluded from taking action against others who, at their own risk, chose to rely on the letter. If regulations such as 24 C.F.R. 3500.4(b) have no effect, then agencies will be less likely to provide informal guidance.[19]

---

[18] PHH notes that the 1997 letter was written by a HUD official who had been delegated authority to enforce RESPA. Br. at 54. But that does not matter because 24 C.F.R. 3500.4(a)(2) explained that no unpublished letter, even one by the Secretary of HUD, would provide a defense to liability.

[19] Note as well that PHH could not possibly have relied on the 1997 letter when it entered into its first captive reinsurance agreement because that agreement predated the Letter by nearly two years. *See* JA.4 (PHH entered its first agreement in November 1995).

Second, PHH contends it relied on a 2004 letter written by a HUD associate general counsel, which stated that HUD would evaluate captive title reinsurance arrangements the same way that it evaluates captive mortgage reinsurance arrangements.[20] JA.259. Again, that second letter was not published in the Federal Register, and thus, pursuant to HUD's rules, provides PHH with no protection.

Further, in a 2007 settlement with a home builder, HUD stated that "it is HUD's position that it is a violation of Section 8(a) of RESPA to accept a thing of value in the form of an opportunity to participate in money-making captive title reinsurance arrangements in return for the referral of settlement service business to primary title insurance companies."[21] That is, HUD believed it to be a RESPA violation when the builder engaged in the same sort of conduct that PHH engaged in.

---

[20] It is far from clear that the 2004 letter in any way justifies PHH's violations. The letter states that a captive title insurance arrangement could pass muster under RESPA if payments under the arrangement are "bona fide compensation *that* does not exceed the value of such services." JA.259. Because the word "that" in this clause is a defining pronoun, the payment must satisfy both criteria – it must be bona fide, and it must "not exceed the value of such services." Even if the payments that PHH received did not exceed the value of the reinsurance it provided, those payments were not bona fide because they were a quid pro quo for referrals.

[21] HUD settlement with Beazer Homes USA, Inc., http://portal.hud.gov/hudportal/ documents/ huddoc?id=DOC_19718.pdf, at 3 (Oct. 23, 2007) (last visited March 31, 2017).

Nor can PHH rely on other HUD policy statements. *See* Br. at 41. Those statements address fact situations that bear no similarity to PHH's captive reinsurance scheme, such as rental of office space, lock-outs, 61 Fed. Reg. 29264 (June 7, 1996), and yield spread premiums, 66 Fed. Reg. 53052 (Oct. 18, 2001). None of the statements suggests that a lender may condition referrals to a settlement service provider on payments by the settlement service provider, even if those payments are in the guise of a fair-market-value purchase of services. *See*, *e.g.*, 61 Fed. Reg. 29264 (if an office rental payment is based upon the number of referrals, the payment will be considered a violation of section 8(a)).[22]

Further, Congress has already provided a defense to liability for those who lack fair notice of what RESPA requires, but it is a defense that PHH cannot satisfy. Section 19(b) of RESPA provides that those who "act … in good faith in conformity with any rule, regulation, or interpretation" issued by the Secretary of HUD (or, since 2011, issued by the Bureau) shall not be liable, even if such rule, regulation, or interpretation is later amended or rescinded. 12 U.S.C. 2617(b). HUD issued 24 C.F.R. 3500.4 (which was republished by the Bureau as 12 C.F.R.

[22] Indeed, 1997 letter cautioned that mortgage reinsurance arrangements are "not necessarily comparable to other types of settlement services." JA.258.

1024.4 (2011)) to implement section 19(b). As explained above, PHH relied on nothing that satisfied that rule.[23]

So *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), hardly decides this case. *See* Br. at 51; Op. at 85. In that case, the Court faulted the Department of Labor for changing its interpretation of a regulation through the filing of an amicus brief in an adjudicatory proceeding. Here, however, the Bureau did not change a pre-existing agency interpretation because neither HUD nor the Bureau ever provided any sort of formal guidance that would have authorized a lender to use a captive reinsurance arrangement as a quid pro quo for referrals. It is well-settled that without offending concepts of fair notice, an agency may interpret ambiguous statutory provisions in adjudicative proceedings, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), and may apply those interpretations retrospectively, *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-85 (D.C. Cir. 1987) (en banc); *see also Verizon Tel. Cos. v. FCC*, 269 F.3d

[23] PHH argues that even if it could not use the 1997 letter to satisfy RESPA section 19(b), it should nonetheless escape liability because "HUD plainly intended its letter ruling to provide guidance to regulated entities and to govern RESPA's application to them." Br. at 54. In fact, HUD's regulations show that it "plainly" did *not* intend the 1997 letter to "govern RESPA's application" to all regulated entities. Why else would it have warned that letters such as the 1997 letter provide no defense to liability?

1098, 1109 (D.C. Cir. 2001) (retroactive effect is appropriate for new applications, or clarification of existing law).[24] That is what happened here.[25]

Finally, PHH and the panel ignore that the Director included an alternative holding in his Decision, in which he applied PHH's interpretation of section 8(c)(2). Even applying that interpretation, the Director concluded that PHH was liable. JA.20-22. PHH's fair notice defense cannot apply to this portion of the Director's Decision.

---

[24] PHH also cites *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), and *Fabi Constr. Co. v. Sec. of Labor*, 508 F.3d 1077 (D.C. Cir. 2007), in support of its contention that it may not be penalized because it was not given fair notice. Br. at 51-52. But those cases involved punitive sanctions, not just disgorgement and injunctive relief. *See Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (recognizing that disgorgement is not a punitive measure); see also *Verizon v. FCC*, 269 F.3d at 1112 (in a challenge to retroactive application of a new interpretation, distinguishing damages from equitable restitution).

[25] PHH offers no support for its contention that, even if it knew its kickback scheme violated RESPA, concepts of fair notice somehow limit its liability because it was unaware that it violated the law not just when loans closed, but every time that it accepted a kickback payment. Br. at 47-49. Concepts of fair notice seek to shield parties that rely in good faith on prior agency pronouncements. *NLRB v. Bell Aerospace*, 416 U.S. at 295. PHH cites no agency pronouncement, only court decisions, which, as discussed above, do not in any event support its interpretation of RESPA liability.

III. IF THIS COURT HOLDS IN *LUCIA* THAT THE SEC's ALJ WAS AN INFERIOR OFFICER, IT SHOULD EITHER SEEK SUPPLEMENTAL BRIEFING IN THIS MATTER OR VACATE AND REMAND TO THE BUREAU

In this proceeding, the Bureau used the services of an ALJ that it borrowed pursuant to an Interagency Agreement between the Bureau and the SEC. Thus, that ALJ was not appointed by the Bureau's Director. *See* JA.75. The ALJ served as the hearing officer in this proceeding and those were the only services that he provided for the Bureau. If this Court in its en banc consideration of *Lucia v. SEC*, *supra*, concludes that the SEC's ALJ in that case was an inferior officer who was not properly appointed, then depending on the reasoning of that decision, this Court should require the parties to file supplemental briefs on whether that holding controls here. In the alternative, if the court believes that the Bureau's ALJ cannot be distinguished, the Court should uphold the constitutionality of the Bureau's structure, vacate the Bureau's Order without addressing PHH's liability under RESPA, and remand so that the Bureau may determine whether to conduct new proceedings using a properly appointed ALJ.

CONCLUSION

For the above reasons, this Court should affirm the Bureau's Decision and Order.

Respectfully submitted,

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel

/s/Lawrence DeMille-Wagman
Lawrence DeMille-Wagman
Senior Litigation Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7957 (telephone)
(202) 435-7024 (facsimile)
lawrence.wagman@cfpb.gov

Counsel for Respondent
Consumer Financial Protection

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,941 words, as determined by the word count function of the Microsoft Word 2010 word processing program, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

/s/Lawrence DeMille-Wagman
Lawrence DeMille-Wagman

ADDENDUM

TABLE OF CONTENTS

PAGE

12 U.S.C. 2617 (2012) .... Add. 1

24 C.F.R. 3500.4 (2011) .... Add. 3

24 C.F.R. 3500.5 (2011) .... Add. 4

12 C.F.R. 1024.4 (2013) .... Add. 6

12 C.F.R. 1024.5 (2013) .... Add. 7

(in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C. 1601 et seq.].

(Pub. L. 93–533, § 12, Dec. 22, 1974, 88 Stat. 1729; Pub. L. 101–625, title IX, § 942(b), Nov. 28, 1990, 104 Stat. 4412.)

REFERENCES IN TEXT

Truth in Lending Act, referred to in text, is title I of Pub. L. 90–321, May 29, 1968, 82 Stat. 146, as amended, which is classified generally to subchapter I (§ 1601 et seq.) of chapter 41 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 15 and Tables.

AMENDMENTS

1990—Pub. L. 101–625 substituted present section catchline for "Fee for preparation of truth-in-lending and uniform settlement statements", inserted after first comma "or by a servicer (as the term is defined under section 2605(i) of this title),", and substituted "lender or servicer" for second reference to "lender" and "2609(c)" for "2605".

§§ 2611 to 2613. Repealed. Pub. L. 104–208, div. A, title II, § 2103(h), Sept. 30, 1996, 110 Stat. 3009–401

Section 2611, Pub. L. 93–533, § 13, Dec. 22, 1974, 88 Stat. 1730, related to establishment of land parcel recordation system on demonstration basis.

Section 2612, Pub. L. 93–533, § 14, Dec. 22, 1974, 88 Stat. 1730, directed Secretary of Housing and Urban Development to report on necessity for further legislation involving real estate settlements.

Section 2613, Pub. L. 93–533, § 15, Dec. 22, 1974, 88 Stat. 1730, directed Secretary of Housing and Urban Development to determine, and report to Congress on, feasibility of including statements of settlement costs in special information booklets.

§ 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Bureau, the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

(Pub. L. 93–533, § 16, Dec. 22, 1974, 88 Stat. 1731; Pub. L. 98–181, title I [title IV, § 461(d)], Nov. 30, 1983, 97 Stat. 1232; Pub. L. 104–208, div. A, title II, § 2103(e), Sept. 30, 1996, 110 Stat. 3009–400; Pub. L. 111–203, title X, § 1098(9), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203 inserted "the Bureau," before "the Secretary".

1996—Pub. L. 104–208 substituted "section 2605, 2607, or 2608 of this title" for "section 2607 or 2608 of this title" and "within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title" for "within one year".

1983—Pub. L. 98–181 amended section generally, striking out a reference to section 2605 of this title, and inserting provision allowing action in district where violation is alleged to have occurred, and provision relating to time limitations in actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

§ 2615. Contracts and liens; validity

Nothing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.

(Pub. L. 93–533, § 17, Dec. 22, 1974, 88 Stat. 1731.)

§ 2616. State laws unaffected; inconsistent Federal and State provisions

This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Bureau is authorized to determine whether such inconsistencies exist. The Bureau may not determine that any State law is inconsistent with any provision of this chapter if the Bureau determines that such law gives greater protection to the consumer. In making these determinations the Bureau shall consult with the appropriate Federal agencies.

(Pub. L. 93–533, § 18, Dec. 22, 1974, 88 Stat. 1731; Pub. L. 94–205, § 9, Jan. 2, 1976, 89 Stat. 1159; Pub. L. 111–203, title X, § 1098(10), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203 substituted "Bureau" for "Secretary" wherever appearing.

1976—Pub. L. 94–205 struck out "(a)" before "This chapter" and struck out subsec. (b) which provided for Federal protection against liability for acts done or omitted in good faith in accordance with the rules, regulations, or interpretations issued by the Secretary. See section 2617 (b) of this title.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–205 effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as a note under section 2602 of this title.

§ 2617. Authority of Bureau

(a) Issuance of regulations; exemptions

The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary[1] may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Bureau is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Bureau deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Bureau issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment—

(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

[1] Probably should be "The Bureau".

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

(Pub. L. 93–533, § 19, as added Pub. L. 94–205, § 10, Jan. 2, 1976, 89 Stat. 1159; amended Pub. L. 98–181, title I [title IV, § 461(e)], Nov. 30, 1983, 97 Stat. 1232; Pub. L. 104–208, div. A, title II, § 2103(f), Sept. 30, 1996, 110 Stat. 3009–401; Pub. L. 111–203, title X, § 1098(11), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203, § 1098(11)(A), substituted "Bureau" for "Secretary" in section catchline.

Subsec. (a). Pub. L. 111–203, § 1098(11)(B), substituted "Bureau" for "Secretary".

Subsecs. (b), (c). Pub. L. 111–203, § 1098(11)(C), substituted "the Bureau" for "the Secretary" wherever appearing.

1996—Subsec. (d). Pub. L. 104–208 added subsec. (d).

1983—Subsec. (c). Pub. L. 98–181 added subsec. (c).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

EFFECTIVE DATE

Section effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as an Effective Date of 1976 Amendment note under section 2602 of this title.

CHAPTER 28—EMERGENCY MORTGAGE RELIEF

Sec.	
2701.	Congressional findings and declaration of purpose.
2702.	Mortgages eligible for assistance.
2703.	Manner of assistance and repayment.
2704.	Insurance for emergency mortgage loans and advances.
2705.	Emergency mortgage relief payments.
2706.	Emergency Homeowners' Relief Fund.
2707.	Authority of Secretary.
2708.	Expiration date.
2709, 2710.	Repealed
2711.	Nonapplicability of other laws.
2712.	Repealed.

§ 2701. Congressional findings and declaration of purpose

(a) The Congress finds that—

(1) the Nation is in a severe recession and that the sharp downturn in economic activity has driven large numbers of workers into unemployment and has reduced the incomes of many others;

(2) as a result of these adverse economic conditions the capacity of many homeowners to continue to make mortgage payments has deteriorated and may further deteriorate in the months ahead, leading to the possibility of widespread mortgage foreclosures and distress sales of homes; and

(9) Conducting of settlement by a settlement agent and any related services;

(10) Provision of services involving mortgage insurance;

(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;

(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

(13) Provision of services involving real property taxes or any other assessments or charges on the real property;

(14) Rendering of services by a real estate agent or real estate broker; and

(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet prepared by the Secretary pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Secretary publishes the form of the special information booklet in the FEDERAL REGISTER. The Secretary may issue or approve additional booklets or alternative booklets by publication of a Notice in the FEDERAL REGISTER.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 3500.5(b)(7)).

Third party means a settlement service provider other than a loan originator.

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

Title service means any service involved in the provision of title insurance (lender's or owner's policy), including but not limited to: title examination and evaluation; preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions. The term also includes the service of conducting a settlement.

Tolerance means the maximum amount by which the charge for a category or categories of settlement costs may exceed the amount of the estimate for such category or categories on a GFE.

[61 FR 13233, Mar. 26, 1996, as amended at 61 FR 29252, June 7, 1996; 61 FR 58475, Nov. 15, 1996; 62 FR 20088, Apr. 24, 1997; 73 FR 68239, Nov. 17, 2008; 74 FR 22826, May 15, 2009]

EFFECTIVE DATE NOTE: At 61 FR 29252, June 7, 1996, § 3500.2(b) was amended by adding a definition of "managerial employee", effective Oct. 7, 1996. At 61 FR 51782, Oct. 4, 1996, the effective date was delayed until further notice.

§ 3500.3 Questions or suggestions from public and copies of public guidance documents.

Any questions or suggestions from the public regarding RESPA, or requests for copies of HUD Public Guidance Documents, should be directed to the Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–8000, rather than to HUD field offices. Legal questions may be directed to the Assistant General Counsel, GSE/RESPA Division, at this address.

§ 3500.4 Reliance upon rule, regulation or interpretation by HUD.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19 (a) and (b) of RESPA (12 U.S.C. 2617 (a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the FEDERAL REGISTER by the Secretary.

(2) A "rule, regulation, or interpretation thereof by the Secretary" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Secretary or any other statement or issuance, whether oral or written, by an officer or representative of the Department of Housing and Urban Development (HUD), letter or memorandum by the Secretary, General Counsel, any Assistant Secretary or other officer or employee of HUD, preamble to a regulation or other issuance of HUD, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion.* In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of HUD staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 3500.3. Such interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

§ 3500.5 Coverage of RESPA.

(a) *Applicability.* RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) *Exemptions.* (1) A loan on property of 25 acres or more.

(2) *Business purpose loans.* An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by Regulation Z, 12 CFR 226.3(a)(1). Persons may rely on Regulation Z in determining whether the exemption applies.

(3) *Temporary financing.* Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a *bona fide* builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4-family residential property is not covered by RESPA and this part.

(4) *Vacant land.* Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) *Assumption without lender approval.* Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an existing federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA and this part, whether or not the lender charges a fee for the assumption.

(6) *Loan conversions.* Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) *Secondary market transactions.* A *bona fide* transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a *bona fide* transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 3500.2.)

[61 FR 13233, Mar. 26, 1996, as amended at 61 FR 58475, Nov. 15, 1996]

§ 3500.6 Special information booklet at time of loan application.

(a) *Lender to provide special information booklet.* Subject to the exceptions set forth in this paragraph, the lender shall provide a copy of the special information booklet to a person from whom the lender receives, or for whom the lender prepares, a written application for a federally related mortgage loan. When two or more persons apply together for a loan, the lender is in compliance if the lender provides a copy of the booklet to one of the persons applying.

(1) The lender shall provide the special information booklet by delivering it or placing it in the mail to the applicant not later than three business days (as that term is defined in § 3500.2) after the application is received or prepared. However, if the lender denies the borrower's application for credit before the end of the three-business-day period, then the lender need not provide the booklet to the borrower. If a borrower uses a mortgage broker, the mortgage broker shall distribute the special information booklet and the lender need not do so. The intent of this provision is that the applicant receive the special information booklet at the earliest possible date.

(2) In the case of a federally related mortgage loan involving an open-ended credit plan, as defined in § 226.2(a)(20) of Regulation Z (12 CFR), a lender or mortgage broker that provides the borrower with a copy of the brochure entitled "When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit", or any successor brochure issued by the Board of Governors of the Federal Reserve System, is deemed to be in compliance with this section.

(3) In the categories of transactions set forth at the end of this paragraph, the lender or mortgage broker does not have to provide the booklet to the borrower. Under the authority of section 19(a) of RESPA (12 U.S.C. 2617(a)), the Secretary may issue a revised or separate special information booklet that deals with these transactions, or the Secretary may chose to endorse the forms or booklets of other Federal agencies. In such an event, the requirements for delivery by lenders and the availability of the booklet or alternate materials for these transactions will be set forth in a Notice in the FEDERAL REGISTER. This paragraph shall apply to the following transactions:

(i) Refinancing transactions;

(ii) Closed-end loans, as defined in 12 CFR 226.2(a)(10) of Regulation Z, when the lender takes a subordinate lien;

(iii) Reverse mortgages; and

(iv) Any other federally related mortgage loan whose purpose is not the purchase of a 1- to 4-family residential property.

(b) *Revision.* The Secretary may from time to time revise the special information booklet by publishing a notice in the FEDERAL REGISTER.

(c) *Reproduction.* The special information booklet may be reproduced in any form, provided that no change is made other than as provided under paragraph (d) of this section. The special information booklet may not be made a part of a larger document for purposes of distribution under RESPA and this section. Any color, size and quality of paper, type of print, and method of reproduction may be used so long as the booklet is clearly legible.

any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 1024.5(b)(7)).

Third party means a settlement service provider other than a loan originator.

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

Title service means any service involved in the provision of title insurance (lender's or owner's policy), including but not limited to: Title examination and evaluation; preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions. The term also includes the service of conducting a settlement.

Tolerance means the maximum amount by which the charge for a category or categories of settlement costs may exceed the amount of the estimate for such category or categories on a GFE.

§ 1024.3 Questions or suggestions from public and copies of public guidance documents.

Any questions or suggestions from the public regarding RESPA, or requests for copies of Public Guidance Documents, should be directed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006. Legal questions concerning the interpretation of this part may be directed to the same address.

§ 1024.4 Reliance upon rule, regulation or interpretation by the Bureau.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19(a) and (b) of RESPA (12 U.S.C. 2617(a) and (b)), only the following constitute a rule, regulation or interpretation of the Bureau:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Bureau and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by Bureau staff and counsel. Such documents may be revoked or amended by a subsequent document published in the FEDERAL REGISTER by the Bureau.

(2) A "rule, regulation, or interpretation thereof by the Bureau" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Bureau or any other statement or issuance, whether oral or written, by an officer or representative of the Bureau, letter or memorandum by the Director, General Counsel, or other officer or employee of the Bureau, preamble to a regulation or other issuance of the Bureau, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion.* In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of Bureau staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 1024.3. Such interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued by HUD before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

§ 1024.5 Coverage of RESPA.

(a) *Applicability*. RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) *Exemptions*. (1) A loan on property of 25 acres or more.

(2) *Business purpose loans*. An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by 12 CFR 1026.3(a)(1) of Regulation Z. Persons may rely on Regulation Z in determining whether the exemption applies.

(3) *Temporary financing*. Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a *bona fide* builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4-family residential property is not covered by RESPA and this part.

(4) *Vacant land*. Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) *Assumption without lender approval*. Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an existing federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA and this part, whether or not the lender charges a fee for the assumption.

(6) *Loan conversions*. Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) *Secondary market transactions*. A *bona fide* transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 1024.21. In determining what constitutes a *bona fide* transfer, the Bureau will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 1024.2).

§ 1024.6 Special information booklet at time of loan application.

(a) *Lender to provide special information booklet*. Subject to the exceptions set forth in this paragraph, the lender shall provide a copy of the special information booklet to a person from whom the lender receives, or for whom the lender prepares, a written application for a federally related mortgage loan. When two or more persons apply together for a loan, the lender is in compliance if the lender provides a copy of the booklet to one of the persons applying.

(1) The lender shall provide the special information booklet by delivering it or placing it in the mail to the applicant not later than three business days (as that term is defined in § 1024.2) after the application is received or prepared. However, if the lender denies the borrower's application for credit before the end of the three-business-day period, then the lender need not provide

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I electronically filed Respondent Consumer Financial Protection Bureau's Brief on Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the District Columbia Circuit by using the appellate CM/ECF system. In addition, 30 paper copies of this Brief will be filed with the clerk of this Court. I certify that counsel for Petitioners (listed below) and counsel for all *amici* are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lawrence DeMille-Wagman

Theodore B. Olson
Helgi C. Walker
Lucas C. Townsend
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Mitchel Kider
David M. Souders
Sandra B. Vipond
Weiner Brodsky Kider PC
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036

Thomas M. Hefferon
William M. Jay
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001